No. 84-910 (3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BUFFALO BROADCASTING COMPANY, INC., et al.,
Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al. IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in determining that the petitioning local television stations failed to prove that the ASCAP blanket license was an unreasonable restraint of trade under Section 1 of the Sherman Act because they failed to prove the absence of real alternatives to the blanket license?

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STATEMENT OF THE CASE

In the courts below, petitioners alleged that the blanket license offered by ASCAP unreasonably restrained trade in violation of Section 1 of the Sherman Act.

This was not a new issue. In 1979, this Court held that the blanket license was not *per se* illegal—reversing a decision of the Court of Appeals, *BMI* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), *reversing* 562 F.2d 130 (2d Cir. 1977) ("*CBS*"). On remand, in 1980, the Court of Appeals held that the blanket license was not anti-competitive and did not restrain trade at all, in view of the availability of direct licensing from copyright owners, a route which CBS had never ex-

plored, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981) ("*CBS Remand*").

In the courts below, everyone agreed that the decisions in *CBS* and *CBS Remand* were the controlling legal precedents. The District Court determined that the blanket license was unlawful under Section 1 of the Sherman Act and banned its use for local television stations. The Court of Appeals reversed, holding that petitioners had failed to prove their case. The evidence, said the court, was insufficient as a matter of law to prove that petitioners lacked the real choices of dealing either with ASCAP via a "per program" license, or with ASCAP's members, or with producers of syndicated programs to acquire music performing rights.

The Parties[1]

Petitioners

Each of the five named petitioners owns one or more television stations; they were certified by the District Court to represent the owners of the approximately 750 stations in the nation, except for the five stations owned by each of the three national television networks, ABC, CBS and NBC.

Petitioners come in all sizes. Some are small stations in rural areas. But they also include major corporate enterprises—for example, Metromedia, Inc., which owns seven stations, including WNEW in New York, KTTV in Los Angeles, WCVB in Boston and WTTG in Washington, D.C., and receives more revenue from its broadcasting operations than any owner other than the three networks.

Since 1949, nearly all stations have been represented in their dealings with ASCAP by the All-Industry Television Station

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1 Pursuant to Rule 28.1 of this Court's Rules, the following information identifies the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the ASCAP respondents which are corporations: Famous Music Corp.—Gulf & Western Industries, Inc. (parent).

Music License Committee (the "All-Industry Committee"), which retained petitioners' counsel here and which has funded this action.

Petitioners' Programming

The local stations have three principal sources of programming: network, syndicated and locally produced.

Some 600 of the approximately 750 stations are affiliated with one or more networks and broadcast programs originated by the networks during much of the broadcast day. The performing rights for music contained in network programs are licensed by the networks from ASCAP and Broadcast Music, Inc.; these rights are not involved in this case.

"Syndication" means distributing programs to individual stations. "Syndicated programs" include feature-length films; programs produced originally for network broadcast, but later made available for local broadcast ("M*A*S*H," "I Love Lucy," "All in the Family"); and programs produced originally for syndication (game shows, "The Merv Griffin Show," etc.).

Locally-produced programming means programs originated by the stations: principally news, sports and talk shows.

Petitioners' Music Use

The focus of the proceedings below was on the music used in syndicated programs. The vast majority of syndicated programs are delivered to the station by the producer or syndicator in recorded form on film or tape. Virtually all these programs contain theme or background music—some contain "feature" music, such as a song sung by a performer on camera.

Under the Copyright Law, the local stations which broadcast these syndicated programs—and thus perform the music—need music performing rights to avoid being infringers.

ASCAP

ASCAP and its members offer the local stations the opportunity to acquire music performing rights.

ASCAP is an unincorporated membership association, formed in 1914 by composers, lyricists, and publishers to license its members' performing rights under the Copyright Act. ASCAP licenses today on behalf of its more than 20,000 writer and 7,000 publisher members.[2]

Ever since 1941, ASCAP has operated under the strictures of an antitrust decree filed in the Southern District of New York in *United States* v. *ASCAP.* In 1950, by agreement between the Antitrust Division and ASCAP and with the approval of the court, the decree was amended quite extensively as to broadcasting, [1950-51] Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

The "Amended Final Judgment," as it is known, requires ASCAP to offer a "per program" license to any broadcaster wishing one. Under the local television station per program license, fees are payable only for programs which use ASCAP music not licensed directly by ASCAP's members. Hence, if the program does not use ASCAP music, or if the ASCAP music used is licensed to the station directly by ASCAP members, the station pays no fee.

The decree permits ASCAP to offer a blanket license—under this form of license the fee is based upon all station revenues, including revenues from programs which contain no ASCAP music, or is a flat fee. But ASCAP may issue such a license *only* when the broadcaster explicitly so *requests* and ASCAP is required to structure its fees so that the prospective licensee shall have a "genuine" choice between the different licenses.

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2 ASCAP, a non-profit enterprise, also licenses on behalf of the hundreds of thousands of members of some 40 affiliated foreign societies which, similarly, license for ASCAP members in their countries. After deducting its operating expenses, ASCAP distributes all of its revenues among its members and affiliated foreign societies, in accordance with surveys of the frequency with which their copyrighted compositions are performed.

Under the Amended Final Judgment, if ASCAP and the broadcaster are unable to agree on a fee, the broadcaster may apply to the District Court for the determination of a reasonable fee for either the blanket or per program form of license, with ASCAP bearing the burden of proving reasonableness.

Most users in this country have always preferred to obtain the blanket license. Indeed, blanket licenses are used throughout the world by performing rights societies in all countries which recognize copyright.

As this Court noted in *CBS*, the last litigation involving ASCAP to reach this Court (441 U.S. at 20):

> "ASCAP and the blanket license developed together out of the practical situation in the market place: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid and indemnified access to any and all of the repertory of compositions, and the owners want a reliable way of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. . . . [T]he costs are prohibitive for licenses with individual radio stations, nightclubs and restaurants, . . . and it was in that milieu that the blanket license arose."

However, if any local television station desires to seek licenses from individual copyright owners, or to request producers of syndicated programs to seek such licenses and thereafter to convey performing rights to the broadcaster, it is free to do so. Under the Amended Final Judgment, each member grants to ASCAP only the *nonexclusive* right to license performances. The member retains the right to license directly.

The availability of the blanket license, therefore, does not restrain trade, in the customary understanding of the term: it does not narrow the arteries of commerce, or eliminate alterna-

tives. As this Court pointed out in *CBS*, 441 U.S. at 21-22, the blanket license is an *additional* alternative made available to users of music:

> "The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product."

Thus, since 1950—since the birth of a commercially viable television industry—the local stations have had at least the following options for acquiring performing rights for music created by ASCAP's members: an ASCAP blanket license (at an agreed upon or judicially determined fee); an ASCAP per program license (at an agreed upon or judicially determined fee); direct dealings with copyright owners; or dealings with producers or syndicators of syndicated programming, who would, in turn, acquire performing rights from copyright proprietors and convey those rights to the stations.

Licensing History

For more than 35 years, the local stations have exercised only one of those options: with only a handful of exceptions down through the years, stations have regularly obtained ASCAP blanket licenses. And, as a result of negotiations between their All-Industry Committee and ASCAP, the effective rate they have paid as a license fee for the blanket license has regularly gone down.

In 1949, when the first fee-bearing blanket license between ASCAP and the local stations was negotiated,[3] the agreed upon fee was 2.5% of the revenues derived by the stations from non-network programs.

In 1954, the parties reached a new agreement: the blanket rate was reduced to 2.05%. (They agreed also on a per

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3 ASCAP first licensed television broadcasters in 1941. At the explicit request of the industry, ASCAP gave the stations a gratuitous blanket license which was in effect until 1948.

program rate of 9% of the revenues from each program using ASCAP music; only a handful of stations took the per program license and in a few years the number dropped to zero.)

In 1957, the licenses were extended by agreement through 1961. The parties reached their next agreement in 1969, after the local stations failed in litigation contending that the Amended Final Judgment obligated ASCAP to issue a specially-tailored license which excluded syndicated programs. *United States* v. *ASCAP* (Application of *Shenandoah Valley Broadcasting, Inc.*), 208 F. Supp. 896 (S.D.N.Y. 1962), *aff'd*, 331 F.2d 117 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964).

The 1969 settlement had, in essence, two provisions: first, the broadcasters agreed that ASCAP's blanket and per program licenses were lawful. In a consent order, the parties jointly advised the District Court of their agreement that "such forms of license agreement may be entered into lawfully [by them]." Second, ASCAP agreed to a sharp rate reduction: the blanket rate was dropped to 2% of the average of 1964-65 revenues, and only 1% on incremental revenues.

As the Court of Appeals wrote in its decision below (14a)[4]:

> "The All-Industry Committee reported to the stations that this rate reduction would save them approximately $53 million through 1977, an estimate that was exceeded because of the rapid growth of station revenue."

These facts—petitioners' representation to the District Court in 1969 that the blanket license is "lawful," in exchange for a rate reduction that subsequently saved them tens of millions of dollars—surely suggest that their alleged injury is imagined, not real.

The new license agreements, with extensions, ran through November 30, 1978.

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4 References are to the appendix to the petition for a writ of certiorari.

In the 1970's, the *CBS* litigation was proceeding apace. In 1977, the Court of Appeals held the blanket license to be *per se* illegal, 562 F.2d 130—a decision which was reversed by this Court in 1979, 441 U.S. 1. But, as the Court of Appeals noted here, "[p]erhaps encouraged by the 1977 ruling in favor of CBS, the local stations began this litigation in [November] 1978" (14a).[5]

Proceedings Below

Petitioners contend here that the ASCAP blanket license violates Section 1 of the Sherman Act—thus petitioners blithely reneged on their representation to the court in 1969 that the blanket license is lawful. (In the courts below, it was our contention that these facts required application of the doctrine of judicial estoppel to bar petitioners from contending that the blanket license was unlawful. The District Court's opinion did not mention this claim, and the Court of Appeals "move[d] past" the argument to consider "the merits of the dispute" (16a).)

The bench trial in the District Court took place in 1981. With the opinions in *CBS* and *CBS Remand* as the controlling precedents, the trial had as its principal focus the availability to petitioners of marketing alternatives to the blanket license.

The District Court Opinion

The District Court held the blanket license unlawful. It found that, as to syndicated programs, the broadcasters had no realistically available alternatives to the blanket license—neither through the per program license, nor by direct dealing with ASCAP members, nor by asking the producers to obtain performing rights and deliver them to the broadcasters (64a-78a).

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5 The All-Industry Committee thereafter participated as an *amicus* in all subsequent stages of the *CBS* litigation. It filed a brief in this Court; on remand, it filed a brief in the Court of Appeals and its counsel was permitted to participate in the oral argument; it then filed a brief urging rehearing by the Court of Appeals and then a brief in this Court urging the grant of certiorari.

The Court of Appeals Decision

The Court of Appeals unanimously reversed. It determined that petitioners had failed to prove their case (4a):

> "[W]e conclude that the evidence was insufficient as a matter of law to show that the blanket license is an unlawful restraint of trade in the legal and factual context in which it currently exists."

The court first found an "absence of evidence" that the "program license has been artificially priced higher than is reasonable for value received"; this barred any conclusion that the "program license is 'too costly' to be a realistic alternative" (22a).

Turning to direct licensing, the court noted the absence of "any evidence that any local station ever offered any composer a sum of money in exchange for the performing rights to his music." The court added (24a):

> "That evidentiary gap exists despite the 21-year interval between entry of the Amended Final Judgment and the trial of this case, during which the local stations had ample opportunity to determine whether performing rights could be directly licensed."

Finally, with regard to source licensing, the court, after considering the arguments tendered by petitioners that "reluctant" syndicators could not be "compelled" to engage in such transactions, concluded (32a):

> "Our task, in determining whether plaintiffs have presented evidence sufficient to support a conclusion that the blanket license is a restraint of trade, is not to psychoanalyze the sellers but to search the record for evidence that the blanket license is functioning to restrain willing buyers and sellers from negotiating for the licensing of performing rights to individual compositions at reasonable prices. Plaintiffs have simply failed to produce such evidence."

On this issue, however, the court considered petitioners' efforts, beginning in mid-1980, long after this lawsuit was started, "to create a paper record designed to show the unavailability of source licensing" (28a). Agreeing with the trial court, the Court of Appeals (30a)

> "declined to give any probative weight to the plaintiffs' transparent effort to assemble in the midst of litigation evidence that they had seriously tried to obtain source licensing."

The transparency of this effort—and the light it casts on the extent to which petitioners failed to prove their case—is best shown by the almost farcical evidence petitioners offered at the trial as to the happenings at Metromedia, Inc.:

Metromedia, in addition to being a major broadcaster, owns a subsidiary, Metromedia Producers Corp. ("MPC"), the fourth-ranking producer of first-run syndicated programming. To create evidence for the trial of this lawsuit, lawyers representing Metromedia and MPC decided that Metromedia should ask MPC to obtain music performing rights for the MPC programs broadcast on Metromedia's stations. The request was made by one Metromedia lawyer addressed to another Metromedia lawyer representing MPC. The latter was also Metromedia's representative on the All-Industry Committee. After discussing his proposed response with petitioners' counsel, MPC's lawyer wrote back to Metromedia's other lawyer that it would be "difficult, if not impossible" for MPC to clear performing rights for Metromedia's stations. This correspondence was then filed only in Metromedia's legal department, in a special file created for this lawsuit; it saw the light of day when it was offered at trial to prove the "reluctance" of syndicators to engage in source licensing.

After a review of this incident and the other record evidence, the Court of Appeals concluded (36a):

> "[W]e hold that the local television stations have not presented evidence in this case permitting a conclusion that the blanket license is a restraint of trade in violation of section 1."

REASONS FOR DENYING THE WRIT

I.

The Narrow Factual Holding Of The Court Below Presents No Question Of General Importance Warranting Review By This Court

The Court of Appeals did not decide an important question of federal law that requires further review. It held only that petitioners failed to prove their case.

Petitioners' failure below was all the more striking because it came after the Court of Appeals' decision in *CBS Remand* pointing out the parallel failure in CBS' claim of antitrust illegality.

Unlike the 1977 decision of the Court of Appeals in *CBS*, which did serious mischief to the antitrust laws by misapplying the *per se* doctrine, the decision now sought to be reviewed involves only narrow factual issues based on a particular record and particular plaintiffs in what this Court has recognized as the *sui generis* world of music performing rights licensing, 441 U.S. at 10.

The decision below does no mischief and creates no turmoil—just as the *CBS* decision by this Court and the *CBS Remand* decision by the Court of Appeals have done no mischief and created no turmoil.

Applying the same mode of analysis as it did in *CBS Remand*, the court below found a failure of evidentiary proof. Deciding no novel, general or important legal issues, the court held simply that petitioners failed to prove the facts supporting the allegations of illegal conduct made in their complaint.

Nothing in the opinion below offends any antitrust rule of general applicability. The court below recognized—as it did in *CBS Remand*—that " '[a]n antitrust plaintiff is not obliged to pursue any imaginable alternative, regardless of cost or efficiency, before it can complain that a practice has restrained competition' " (17a-18a).

Since petitioners failed to prove that they lacked real choices in dealing with ASCAP, or its members, or syndicators, the court ordered the complaint dismissed. It was reinforced in its view by this Court's recent decision in *NCAA* v. *Board of Regents of the University of Oklahoma*, 104 S. Ct. 2948 (1984).

In short, this is another suit by users of ASCAP music who failed at trial—like CBS failed—to prove that they lacked real choices. It is an inappropriate vehicle for any further review by this Court of the function and effects of the blanket license offered to music users.

Finally, to deny certiorari here is not to leave users of ASCAP music without a remedy if they should come forward with real evidence that they have been abused. Ample means exist for consideration and resolution of issues concerning the licensing of performing rights to copyrighted music. This Court's opinion in *CBS* pointed out that (441 U.S. at 13):

> "[T]he Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the [consent] decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices."

II.

The Decision Below Does Not Conflict With The Mandate Of This Court In CBS

The Court of Appeals here made an appropriate rule of reason assessment—just as it made an appropriate rule of reason assessment in *CBS Remand*. It concluded that petitioners simply failed to prove their case—its primary inquiry was into the nature and competitive effects of the alleged restraint. It found that petitioners had failed to prove, in the market context of the local television industry, that the blanket

license had any anticompetitive effect. Nothing further was required.

Petitioners' grievance, if any, derives from the factual weakness of their case, not from any justified objections to the legal rulings made by the court below.

Indeed, it would appear that petitioners' real quarrel is with this Court's refusal in *CBS* to find the blanket license *per se* illegal. Petitioners point to this Court's recognition in *CBS* that the blanket license constitutes literal "price fixing," 441 U.S. at 9, and "the [license] fee is not set by competition among individual copyright owners," 441 U.S. at 23. Of course, in *CBS* this Court also said (441 U.S. at 23-24):

> "[T]he blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets. Moreover, the substantial restraints placed on ASCAP and its members by the consent decree should not be ignored. The District Court found that there was no legal, practical or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short, had a real choice."

In any event, it is hard to see how any further inquiry into the effects of the blanket license could be productive for petitioners. For example, this Court, in *CBS*, viewed both transaction and monitoring cost savings from the blanket license as inevitable and significant, even for a single television network; *a fortiori*, for 750 local television stations. The Court said (441 U.S. at 21):

> "But even for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that

obviates the need for closely monitoring the networks to see that they do not use more than they pay for."

Moreover, in *NCAA*, *supra*, this Court noted (104 S. Ct. at 2961, 2968):

> "*Broadcast Music* squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive."
>
> * * *
>
> "In *Broadcast Music*, the availability of a package product that no individual could offer enhanced the total volume of music that was sold. . . . [T]here was no limit of any kind placed on the volume that might be sold in the entire market and each individual remained free to sell his own music without restraint."

Here, the District Court found as an "undeniable fact that the blanket license does not restrict output; indeed, the blanket license encourages the use of music by eliminating marginal costs once the license is purchased" (82a).

III.

The Decision Below Does Not Conflict With Decisions Of Other Circuits

Petitioners have failed to demonstrate any conflict with decisions of other circuits. In view of the narrow and limited factual nature of the holding below, this is hardly surprising.

The fact that other circuits, in totally different factual contexts, have engaged in other and different kinds of *factual* analysis is not conflict. There is no conflict on the pertinent *legal* principles.

Indeed, the decision below is wholly in harmony with decisions in other circuits. See *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968); *BMI* v. *Moor-Law, Inc.*, 527 F. Supp. 758 (D. Del.

1981), *aff'd mem.*, 691 F.2d 490 (3d Cir. 1982); *F.E.L. Publications, Ltd.* v. *Catholic Bishop of Chicago,* 1982-1 Trade Cas. (CCH) ¶ 64,632 (7th Cir.), *cert. denied,* 459 U.S. 859 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
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